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No. 76-1025

# In the Supreme Court of the United States

OCTOBER TERM, 1976

MARK JACOBSON and RANGER BAKERS, INC., PETITIONERS

*v.*

THE INTERNAL REVENUE SERVICE OF THE UNITED STATES, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE RESPONDENTS IN OPPOSITION

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## OPINIONS BELOW

The memorandum and order of the district court (Pet. App. 8a-18a) are reported at 403 F. Supp. 1332. The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 544 F. 2d 637.

## JURISDICTION

The judgment of the court of appeals was entered on November 3, 1976 (Pet. 2). The petition for a writ of certiorari was filed on January 26, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether petitioners' suit to enjoin the assessment of federal employment taxes was barred by the Anti-Injunction Act.

2. Whether the district court correctly dismissed petitioners' suit for compensatory and punitive damages against government officials for alleged harassment and discriminatory enforcement of the tax laws.

3. Whether Section 6862(a) of the Internal Revenue Code of 1954, which permits the Commissioner to issue a jeopardy assessment for federal employment taxes if he believes the collection of the tax will be jeopardized by delay, is constitutional.

## STATUTES INVOLVED

The pertinent provisions of Sections 6862 and 7421 of the Internal Revenue Code of 1954, as amended (26 U.S.C.), are set forth at Pet. App. 18a-19a.

## STATEMENT

In October, 1974, petitioner Ranger Bakers purchased the assets of Silvercup Bakers, Inc., which was then in bankruptcy proceedings. Shortly thereafter, Ranger Bakers had financial difficulties. For the second quarter of 1975, Ranger had an unpaid federal employment tax liability of approximately $264,500.[1] On September 30, 1975, the Internal Revenue Service notified Ranger Bakers

[1]Sections 3102 and 3402 of the 1954 Code (26 U.S.C.) require an employer to withhold social security taxes and income taxes, respectively, from its employees' wages. Section 3111 provides for the employer's share of the social security tax, which is the employer's independent obligation. The vast majority of the taxes involved in this case were withholding taxes, which constitute a special trust fund for the United States. See Section 7501 of the Code.



that these taxes were due and owing, and that payment should be made by October 9, 1975 (Pet. App. 3a-4a, 10a).

That same day, petitioner Mark Jacobson, the president and sole shareholder of Ranger Bakers, met with Internal Revenue officials, including Dominick Pallila and Martin Senzer, and explained the corporation's plight. He requested that Ranger Bakers be permitted to pay the delinquency in weekly installments of $10,000. However, no decision was reached on Jacobson's request. On October 1, 1975, the Commissioner notified Jacobson that his request to pay the delinquency in installments was denied (Pet. App. 4a, 10a-11a).

Pursuant to his authority under Section 6862(a) of the Code, the Commissioner issued a jeopardy assessment on that day against Ranger Bakers, permitting collection of the unpaid taxes by means of immediate levy on the corporation's property. Levies were placed on Ranger's payroll account and on several of its customers' accounts payable. Jacobson paid the corporation's entire liability (including interest) with the help of outside sources on October 2, 1975, and the Service released the levies (Pet. 6; Pet. App. 4a, 10a-11a).

Ranger Bakers was likewise delinquent in paying its employment taxes during the third quarter of 1975. On October 14, 1975, the Commissioner made a jeopardy assessment against Ranger Bakers for these taxes and placed further levies on its property. Jacobson also paid this assessment with the help of outside sources, and the Service immediately released the levies. Ranger Bakers ceased operations in November, 1975 (Pet. App. 4a-5a).

On October 15, 1975, petitioners instituted this action in the United States District Court for the Eastern District of New York seeking injunctive relief against the

Internal Revenue Service and damages against various officials of the Service. Petitioners alleged that the Organized Crime and Racketeering Section of the Department of Justice, which was investigating possible criminal violations concerning Ranger Bakers, Silvercup Bakers and others, provided information to several newspapers, which published articles indicating that Jacobson operated Ranger Bakers as a "front" for his father, who was described as involved in underworld gambling activities. Petitioners alleged that the Department of Justice sought to destroy Ranger Bakers' business by disclosing this information, and that the Internal Revenue Service and its employees had conspired with the Department of Justice to accomplish this objective (Pet. App. 4a, 9a).

Petitioners sought an injunction against any further investigation by the Department of Justice and against the Internal Revenue Service's refusal to permit payment of the employment tax delinquencies on an installment basis. In addition, petitioner Jacobson sought compensatory damages of $1,500,000 under 42 U.S.C. 1981 and 1985, and punitive damages of $3,000,000 (Pet. App. 2a-3a, 7a, 9a).

After a hearing, the district court denied petitioners' request for a preliminary injunction against the Internal Revenue Service and its named officials because the suit was barred by the Anti-Injunction Act, and dismissed the complaint against the Internal Revenue Service and its officials (Pet. App. 9a-16a).[2] The court of appeals affirmed. It held that the Anti-Injunction Act prohibited petitioners'

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[2]In a separate order, the district court dismissed the complaint as to the Department of Justice and petitioners did not appeal from that aspect of the decision (Pet. 7).



suit for injunctive relief, and that the allegations with respect to damages "clearly state no claim for relief" (Pet. App. 1a-7a).

## ARGUMENT

1. The Anti-Injunction Act, 26 U.S.C. 7421(a), provides that "* * * no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed." In *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, the Court stated that the purpose of the statute was to protect the government's need to assess and collect taxes as expeditiously as possible with a minimum of pre-enforcement judicial interference. The Court held that the statute barred equity suits against the tax collector unless the taxpayer could show: (1) irreparable injury, the essential prerequisite for injunctive relief; and (2) that "it is clear that under no circumstances could the Government ultimately prevail * * *" (370 U.S. at 7). Accord: *Bob Jones University* v. *Simon*, 416 U.S. 725, 736-737.

The court of appeals correctly held that the Anti-Injunction Act barred petitioners' suit. Indeed, since petitioners have not contested the employment tax assessments, they did not show under the second requirement of *Williams Packing* that the government would not prevail on the merits of its claim.

Contrary to petitioners' argument (Pet. 7-9), nothing in *Laing* v. *United States*, 423 U.S. 161, supports their claim that the Anti-Injunction Act is not applicable. The question in *Laing* was whether income taxes found owing, but not reported, pursuant to the termination of a taxpayer's taxable year under Section 6851 of the Code, were a "deficiency" within the meaning of Section 6211(a). In

holding that the amount was a "deficiency," the Court ruled that where the Internal Revenue Service has not sent a notice of deficiency in connection with its termination of a taxpayer's taxable year, Section 6213(a) permits an injunction against such an assessment pending the issuance of a notice of deficiency (423 U.S. at 184-185, n. 27). But as the courts below correctly recognized (Pet. App. 5a-6a, 11a-12a), the statute does not require that a notice of deficiency be issued with respect to employment taxes. The rule of *Laing* therefore has no application to this case.

2. Contrary to petitioners' further assertion (Pet. 8-10), the court of appeals correctly rejected their claim for damages against the Internal Revenue Service officials on the ground that they were denied due process. Petitioners' allegations involve nothing more than the usual actions taken by Internal Revenue Service officials to collect employment tax delinquencies from a failing business; their conclusory charge of "harrassment" is insufficient to show any violation of constitutional rights.

3. Finally, the court of appeals correctly rejected petitioners' argument (Pet. 9) that the jeopardy assessment provisions of Section 6862(a) are unconstitutionally vague. This Court has long upheld the constitutionality of such summary collection procedures. See *Phillips* v. *Commissioner*, 283 U.S. 589, 595-596; *Mitchell* v. *W. T. Grant Co.*, 416 U.S. 600, 611. The provision in that section that the Internal Revenue Service may make a jeopardy assessment if it "believes" that the collection of any tax "will be jeopardized by delay" is not unconstitutionally vague; it provides a sufficiently definite standard to enable the Service to act in an infinite variety of situations when prompt collection is necessary to protect the revenue. See *Arnett* v. *Kennedy*, 416 U.S. 134, 158-164; *Jordan* v. *DeGeorge*, 341 U.S. 223, 231.



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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